No. 90-1784

Supreme Court, U.S.
FILED
MAY 20 1991
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

GENE E. POTTER,
Petitioner

v.

STATE OF OHIO

Petition for a Writ of Certiorari to the Supreme Court of Ohio

---

PETITION FOR A WRIT OF CERTIORARI

GREGORY M. KOSTELAC
Attorney at Law
2889 Georgesville-Wrightsville Road
Grove City, Ohio 43123-9780
(614) 851-1194
Counsel of Record for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the constitutional rights of an individual are abridged when local police officers ignore and violate a specific state statutory provision restricting their powers of arrest and detention by those officers conducting an extraterritorial investigation without a reasonable basis for doing so, subsequently leading to an extraterritorial, warrantless stop, detention, arrest and conviction.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	2
STATEMENT	2
1. Material facts	2
2. Proceedings below	3
REASONS FOR GRANTING THE PETITION	4
CONCLUSION	5
APPENDIX A	1a
APPENDIX B	2a
APPENDIX C	6a
APPENDIX D	8a

TABLE OF AUTHORITIES

Cases:	Page
City of Cincinnati v. Alexander, 54 Ohio St. 2d 248 (1978)	4
City of Kettering v. Hollen, 64 Ohio St. 2d 232 (1980)	4
Smith v. Ohio, 494 U.S. —— (1990)	4, 5
State v. Smith, 45 Ohio St. 3d 255 (1989)	4
Statutes:	
§ 2935.03, Ohio Revised Code	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No.

GENE E. POTTER,

Petitioner

v.

STATE OF OHIO

Petition for a Writ of Certiorari to the Supreme Court of Ohio

---

PETITION FOR A WRIT OF CERTIORARI

Gene E. Potter, through counsel, hereby petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio.

OPINIONS BELOW

The decision of the Supreme Court of Ohio (App., *infra*, 1a) and the decisions of the Court of Appeals of Union County, Third Appellate District (App., *infra*, 2a-6a) and the Marysville Municipal Court (App., *infra*, 8a-9a) are all unreported.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on February 20, 1991. The jurisdiction of this Court is invoked under Article III, Section 2 of the Constitution of the United States and 28 U.S.C. § 1257(1).

STATUTORY PROVISION INVOLVED

Section 2935.03 of the Ohio Revised Code entitled "Arrest and detention until warrant can be obtained", as the same was in effect on December 19, 1988, provided in pertinent part:

> (A) A . . . . police officer . . . . shall arrest and detain, until a warrant can be obtained, a person found violating, within the limits of the political subdivision . . . . in which the peace officer is appointed, employed, or elected, a law of this state or an ordinance of a municipal corporation.
>
> * * * *
>
> (E) If a . . . . police officer . . . . is authorized by division (A) of this section to arrest and detain, within the limits of the political subdivision . . . . a person until a warrant can be obtained, the peace officer may, outside the limits of the political subdivision . . . . in which he is appointed, employed, or elected, pursue, arrest, and detain that person until a warrant can be obtained if all of the following apply:
>
> > (1) The pursuit takes place without unreasonable delay after the offense is committed;
> >
> > (2) The pursuit is initiated within the limits of the political subdivision . . . . in which the peace officer is appointed, employed, or elected;
> >
> > (3) The offense involved is a felony, a misdemeanor of the first degree or a substantially equivalent municipal ordinance. . . .

STATEMENT

1. Material facts

In response to an anonymous citizen's band radio broadcast of a suspected drunk driver in a red truck relayed via police dispatch, officers of the City of Dublin Police Department proceeded toward the vicinity identified therein. Their investigation took them beyond the City

of Dublin's Municipal boundary and that of Franklin County into adjoining Union County where, approximately three miles beyond their jurisdictional limits they first observed the petitioner driving slowly and erratically. These officers were not in hot pursuit of the petitioner nor did they, at any time prior thereto, observe him within their jurisdiction.

After overtaking petitioner's vehicle, these Dublin Police officers, without a warrant, stopped and detained petitioner. They ordered him to perform certain field sobriety tests outside his vehicle, recorded their observations and concluded that petitioner failed certain of these tests. While these tests were in progress, a trooper of the Ohio State Highway Patrol was proceeding to the scene and upon his arrival, performed additional field sobriety tests before placing petitioner under arrest and removing him to the Marysville City Jail for chemical tests. Petitioner was then formally charged by the same State Highway Patrol Trooper with failure to maintain a traffic lane and operating a motor vehicle while intoxicated. The complaints were filed in Marysville (Ohio) Municipal Court (the Trial Court).

2. Proceedings below

Following his December 19, 1988 arrest the petitioner entered pleas of not guilty to the offenses charged. He then filed a written Motion to dismiss these charges or alternatively to Suppress Evidence on the basis that his having been stopped and detained by police officers from another jurisdiction, contrary to a specific state statute, offended both the U.S. and Ohio Constitutions.

The Trial Court heard petitioner's Motion at a pretrial hearing on January 20, 1989. Material facts were orally entered upon the record by stipulations of counsel supplemented by a written statement of the Dublin Police officers who did the investigation, stop and detention of the petitioner. Post-hearing written Memoranda Contra

and in Reply were subsequently presented to the Trial Court.

The petitioner appealed the Trial Court's overruling his Motion to Dismiss/Suppress Evidence and its subsequent Judgment of conviction to the Court of Appeals of Union County, Third Appellate District. On August 20, 1990 the Court of Appeals affirmed the judgment of the Trial Court (Apps. C & D, *infra*, 2a, 6a) and on February 20, 1991 the Ohio Supreme Court declined review (App. A, *infra*, 1a).

REASONS FOR GRANTING THE PETITION

The question presented in this case makes it again necessary for this Court to correct Ohio Courts in their interpretation and application of the Fourth Amendment, this time in the context of extraterritorial, warrantless stops, detentions and arrests. Although this Court's recent decision in *Smith v. Ohio*, 494 U.S. —— (1990) reversing *State v. Smith*, 45 Ohio St. 3d 255 (1989) was cited to the Supreme Court of Ohio and previously to the Court of Appeals for Union County, Ohio, both failed to comment upon or even note that case. Therefore, the constitutional propositions of *Smith* have yet to be applied and can now only be done upon further review.

The Ohio General Assembly chose some time ago to define and restrict the arrest and detention powers of Ohio's various law enforcement personnel by enacting Section 2935.03 of the Ohio Revised Code. This statutory authority was then recognized by the Ohio Supreme Court in *City of Cincinnati v. Alexander*, 54 Ohio St. 2d 248 (1978) only to be eroded subsequently in *City of Kettering v. Hollen*, 64 Ohio St. 2d 232 (1980). The continued erosion of this statutory authority has led to a confused and distorted state of the law in Ohio that, as this case now demonstrates, poses a severe threat to its citizens basic Fourth Amendment rights.

It is imperative that this Court now review this case and restate those Fourth Amendment propositions set forth in *Smith v. Ohio.* Ohio law enforcement officers and Ohio Courts must again be reminded that an illegal stop and detention is per se unreasonable and unconstitutional.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GREGORY M. KOSTELAC
Attorney at Law
2889 Georgesville-Wrightsville Road
Grove City, Ohio 43123-9780
(614) 851-1194

Counsel of Record for Petitioner

May 20, 1991

APPENDICES

APPENDIX A

THE SUPREME COURT OF OHIO

1991 TERM

Case No. 90-2001

STATE OF OHIO,

Appellee,

v.

GENE E. POTTER,

Appellant.

ENTRY

To wit: February 20, 1991

Upon consideration of the motion for an order directing the Court of Appeals for Union County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by Gregory M. Kostelac.

(Court of Appeals No. 148913)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX B

COURT OF APPEALS
UNION COUNTY, OHIO
THIRD APPELLATE DISTRICT

Case Number 14-89-13

STATE OF OHIO,
Plaintiff-Appellee,

v.

GENE E. POTTER,
Defendant-Appellant.

OPINION

CHARACTER OF PROCEEDINGS: Criminal Appeal from Municipal Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: August 20, 1990.

ATTORNEYS:

MR. GREGORY M. KOSTELAC
Attorney at Law
P.O. Box 15842
Columbus, Ohio 43215-0842
For Appellant.

MR. R. LARRY SCHNEIDER
Prosecuting Attorney
Mr. Kevin Pelanda
111 West Sixth Street
Marysville, Ohio 43040
For Appellee.

SHAW, P.J. This is an appeal by Defendant-Appellant, Gene E. Potter, from a judgment of the Municipal Court of Marysville on March 22, 1989, finding him guilty of violating R.C. 4511.19(A)(1), driving "* * * under the influence of alcohol * * *" and R.C. 4511.19(A)(3), having "* * * a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath."

On December 19, 1988, Dublin Police Officer Timothy C. Jones received a citizens band radio report of a drunken driver in a red pick-up truck on U.S. Rt. 33 in the vicinity of Interstate 270. Officer Jones proceeded to the area, but did not immediately observe a vehicle matching the one described in the radio report. Jones continued westbound on U.S. Rt. 33 eventually leaving his jurisdictional bounds of the City of Dublin. Shortly thereafter, he observed a red pick-up truck traveling at a speed slower than the flow of traffic and weaving from side to side.

Upon stopping the vehicle, Officer Jones found the defendant to be the driver and conducted a series of field sobriety tests which the defendant executed poorly. Officer Jones detained the defendant until a State Highway Patrolman arrived at the scene and conducted his own field sobriety tests. Defendant was then placed under arrest by the Highway Patrolman. Subsequently defendant tested at .139 grams of alcohol in 210 liters of his breath on the BAC Verifier. Defendant also submitted that he had consumer four or five beers that night.

Prior to his conviction defendant filed a motion to suppress evidence which, upon hearing, was overruled. Thereafter, the defendant changed his "not guilty" plea to "no contest" and was convicted of the charged offenses.

Defendant now appeals and assigns the following assignment of error:

"THE TRIAL COURT ERRED IN FINDING THAT POLICE OFFICERS HAD A REASONABLE BASIS UPON WHICH TO CONSTITUTIONALLY MAKE AN EXTRATERRITORIAL, WARRANTLESS STOP, DETENTION AND ARREST OF THE DEFENDANT/APPELLANT, THEREBY OVERRULING HIS MOTION TO DISMISS/SUPPRESS EVIDENCE AND SUBSEQUENTLY CONVICTING HIM OF THE OFFENSES CHARGED."

This court has previously held that police may investigate criminal acts outside their jurisdictional city limits without the evidence obtained being subjected to suppression. *State* v. *Dotson* (1987), 35 Ohio App. 3d 135.

Also, in *State* v. *Black* (Oct. 29, 1989), Hardin App. No. 6-88-2 and 6-88-5, unreported, we held:

> "It is well established that in Ohio the exclusionary rule is applicable only to a violation of constitutional rights and not to mere statutory violations."

Whether a police officer should be operating outside his jurisdictional bounds on a particular occasion, at best, poses a statutory violation as opposed to a constitutional question and is therefore not subject to the exclusionary rule on that basis alone.

Though stopping and detaining an automobile necessarily implicates the Fourth and Fourteenth Amendments as a "seizure", it is well settled that probable cause exists when there is an articulable and reasonable suspicion that there is a violation of law. *Delaware* v. *Prouse* 440 US 648.

In the case at bar, Officer Jones observed the defendant's vehicle traveling at a slower speed than the traffic flow and weaving side to side. Based upon these observations Officer Jones had the requisite articulable and reasonable suspicion that a law was being violated, thereby allowing him to stop and detain the defendant.

Further, "probable cause" to arrest has been defined as follows:

> "'* * * The existence of probable cause is determined by factual and practical considerations of everyday life on which reasonable and prudent men act. *Draper* v. *United States* (1959), 358 U.S. 307. In examining these factual and practical considerations the focus is on whether, *at the moment of the arrest*, the facts and circumstances within the officer's knowledge *and of which he had reasonable trustworthy information* were sufficient to warrant a prudent man in believing that the suspect had committed an offense. *Beck* v. *Ohio* (1964), 379 U.S. 89.'" *State* v. *Conover* (1985), 23 Ohio App. 3d 161, 162, quoting *State* v. *Giner* (Mar. 28, 1984), Summit App. No. 11385, unreported. (Emphasis added.)

Defendant failed the field sobriety tests conducted by both officers which, in turn, warranted a reasonable belief that he was in violation of laws by operating his vehicle under the influence of alcohol. The arrest was made by an Ohio Highway Patrolman who clearly had the authority to make such an arrest.

In light of the foregoing case authority and analysis, the defendant's single assignment of error is not well taken and overruled. The judgment and sentence of the municipal court is affirmed.

Judgment affirmed.

MILLER and EVANS, JJ., concur.

APPENDIX C

IN THE COURT OF APPEALS
OF THE THIRD APPELLATE JUDICIAL DISTRICT
OF OHIO
UNION COUNTY

Case Number 14-89-13

STATE OF OHIO,
Plaintiff-Appellee,

v.

GENE E. POTTER,
Defendant-Appellant.

JOURNAL ENTRY

This cause came on to be heard on appeal and was submitted to the Court upon the record, the briefs and oral arguments of the parties.

Upon consideration the Court finds no error prejudicial to the appellant in any of the particulars assigned and argued in appellant's brief.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the Municipal Court of Marysville be, and the same hereby, is affirmed at the costs of the appellant, for which judgment is hereby rendered, and that the cause be, and the same hereby is, remanded to that court for execution.

It is further ORDERED that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any

other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge.

Exceptions saved.

/s/ Stephen R. Shaw
/s/ John R. Evans
/s/ Edgar L. Miller
Judges

DATED: August 20, 1990.

APPENDIX D

IN THE MARYSVILLE MUNICIPAL COURT
MARYSVILLE, OHIO

Case No. 88 TRC 5452 and 88 TRD 5453

STATE OF OHIO

-vs-

GENE E. POTTER,

Defendants

JUDGMENT ENTRY

This matter coming on for hearing on Defendant's Motion to Dismiss/Suppress, and the stipulated facts, and the Court finds that Defendant was stopped by a Dublin police officer in Union County, Ohio, because of a C.B. report from an unknown person of a possible drunk driver in a red truck on Route 33 and 270 heading west, said police officer observing a red truck weaving within it's lane of travel at an unusually slow rate of speed. The Court further finds that the C.B. report, coupled with the unusual pattern of driving observed by the officer, albeit outside his jurisdiction, constituted a reasonable basis for an investigative *Terry* stop (*Terry* v. *Ohio*, (1968) 392 U.S. 1) of the red truck driven by the Defendant.

The Third Appellate District Court of Appeals, in *State v. Dotson*, (1987) 35 Ohio App. 3d 136, held that police may conduct extraterritorial investigations and turn the results over to the proper jurisdictional authorities to make an arrest, without viclating the subject's constitutional rights.

It is, therefore, ORDERED that Defendant's Motion to Dismiss/Suppress be and is hereby overruled.

/s/ Richard E. Parrott
RICHARD E. PARROTT
Judge

[Filed Feb. 27, 1989]